***Keywords*:**

Gender identity

Headnotes:

The regulatory developments at national level and at the level of the Council of Europe and European Union, reflected in the case-law of the Constitutional Court, the ECHR and the CJEU, support and highlight the fact that gender identity/gender equality means more than biological sex/biological differences, thus combating the gender stereotypes attached to the traditional approach to the roles of women and men in society. For almost two decades, through express rules, the Romanian State has embraced this vision, Romania being aligned with the international evolutions in the matter through the provisions of Article 20 of the Constitution, which establish the priority of the highest standards of protection of fundamental rights.

Summary:

I. According to the claims of the author of the referral, i.e. the President of Romania, the provisions of Article 7 (1) (e) of Law No 1/2011, introduced by the Sole Article of the Law amending Article 7 of Law No 1/2011 on national education, prohibit, inside all teaching establishments and institutions and inside all facilities destined to vocational education and training, including inside those establishments that provide extracurricular education, activities aimed at spreading the theory or opinion of gender identity, understood as the theory or opinion that gender is a different concept than biological sex and that the two are not always the same. These provisions are contrary to the Romanian Constitution, respectively to Article 16 (1) regarding the principle of equality of citizens before the law, read in conjunction with those of Article 32 on ensuring access to education and with those of Article 49 on the protection of children and young people, to Article 20 (2) on the priority of international regulations on fundamental human rights, to Article 29 on the freedom of conscience and to Article 30 (1) and (2) on the freedom of expression and the prohibition of censorship.

II. 1. Following the analysis of the constitutional and legal framework, the Court noted that the notion of “gender” had a wider scope than that of “sex”/sexuality in the strictly biological sense, incorporating complex elements of a psychosocial nature. Thus, if the notion of “sex” is limited to the biological characteristics that mark the differences between men and women, the notion of “gender” refers to a set of psychological and sociocultural traits. The latter notion includes elements of social identity of the individual, which evolve as the society evolves and which depend on the permanent re-evaluation of the interpretation of the principle of equality and non-discrimination on the basis of sex. Gender identity also referred to the customarily assigned social roles and to the discriminations based on sex/gender. Becoming aware of one’s sex thus appears as a component of gender identification, but the biological factors are supplemented by social ones, gender identity including sexual identity and adapting it to the social demands. The Romanian State has enshrined this vision/approach in its legislation, undertaking obligations aimed, in essence, at combating gender stereotypes and at the effective realization of the principle of equality and non-discrimination. The Court found that the regulatory developments at national level and at the level of the Council of Europe and European Union, reflected in the case-law of the Constitutional Court, the ECHR and the CJEU, supported and highlighted the fact that gender identity/gender equality meant more than biological sex/biological differences, thus combating the gender stereotypes attached to the traditional approach to the roles of women and

men in society. For almost two decades, through express rules, the Romanian State has embraced this vision, Romania being aligned with the international evolutions in the matter through the provisions of Article 20 of the Constitution, which establish the priority of the highest standards of protection of fundamental rights.

Based on these premises, the Court noted that the prohibition, applicable to the teaching staff and to pupils and students, inside all teaching facilities, of activities aimed at spreading theories or opinions on gender identity, understood as the theory or opinion that gender is a concept different from biological sex and that the two are not always the same, was *eo ipso* a problem likely to lead to violations of the freedom of conscience, as long as these provisions generate obligations in the sense of teaching/attending courses/classes on a certain theory/opinion with a result/purpose contrary to the beliefs of each individual. Thus, freedom of conscience means, in essence, the person's ability to have and publicly express her or his views of the surrounding world. Such views are developed under the influence of a multitude of factors during the life of the individual, a framework in which the education system plays an essential role. These views of life cannot be "prescribed" or imposed by the State by asserting certain ideas as absolute truths and by prohibiting, *de plano*, any attempt to learn about any other opinion/theory existing on the same topic, especially when such opinions/theories are promoted/supported from a scientific and legal point of view, marking the societal evolutions at a certain point in time. Therefore, in relation to the provisions of Article 29 (2) of the Constitution, according to which the State guarantees the freedom of conscience, and taking into account the content of this freedom, it follows that, in order to meet the constitutional requirements, the education system must be open to ideas, values, opinions and encourage their free and critical expression. In organizing educational activities, the State must make sure that these freedoms are observed, by providing pupils/students with the possibility to study certain disciplines, theories or opinions, to learn about, think, understand, analyse certain concepts and theories and to express these freely, regardless of their complexity or, perhaps, controversial nature. In other words, the State - through the education system, must support the development of a view of the surrounding world, and not impose it, repressing any possibility of learning about/discussing information about a certain topic/subject. However, a legal constraint, in the sense of prohibiting the teaching staff and the pupils and students, inside all teaching facilities, from conducting any activity aimed at "spreading" - that is, actually, any act of communicating/learning about opinions on gender identity contrary to the one imposed by the State, a theory that can contradict opinions, beliefs or maybe even the gender identity that a person perceives, is contrary to human dignity itself. The State must not disregard the person, with all the complexity inherent in this concept, and place her/him in the background compared to the potential desire of the State to impose a certain idea. In other words, the State's desire, through its authorities, to promote, at some point, a theory on the notions of "sex" and "gender", must not turn into an act of imposing and sanctioning the learning/communication of the existing views on this issue, i.e. an act of restricting the freedom of conscience, as an inherent dimension of human dignity.

The Court noted that ensuring the right to education and, from this perspective, its constitutional guarantee, through the provisions of Article 32, were aimed at educating children, youth, people in general so as to adapt to life in society, which implies a knowledge of the inherent developments of society and an informed acceptance/rejection of theories or opinions circulated at a given time. Consequently, education must be permanently connected to these developments, and not deny, *de plano*, their knowledge. However, the prohibition, in the organized educational environment, of any activity aimed at learning about this issue appears almost anachronistic, likely to suppress access to information and, through this, access to education, aiming at a psycho-

social phenomenon recognized by both legislation and case-law. This, all the more so as the prohibition is worded in general terms and with regard to a notion that, through its multitude of legal, sociological, psychological meanings, can refer to a variety of fields of study and research which thus become forbidden to the addressees of the educational process only because, in one way or another, they can be interpreted as calling into question aspects of gender identity. Such an absolute prohibition is incompatible both with the organization of the education system in a democratic State and with the protection of children and young people, as regulated by Articles 32 and 49 of the Constitution. Hiding/denying/repressing an opinion does not lead to its disappearance, nor can it "protect" the individual from allegedly harmful effects that the State would like to prevent with regard to the education of children and young people.

In the light of the principle of equality, correlated with the right to education and the protection of children and young people, these must be provided, without any discrimination, with the possibility to learn about and study theories, ideas, concepts in line with the societal developments, without constraints likely to censure their freedom of thought and expression. Imposing the State's opinion in a certain field does not serve to consciously embrace a system of values necessary for personal fulfilment and development, and is a real violation of equal opportunities, as long as young people in Romania, citizens of the European Union, are forbidden in their own country to learn about/express opinions/study a certain category of problems and theories. The issue of gender identity is present not only in theoretical debates, but also in legislations and in a rich case-law at European level, and the ban on information on it appears as an unjustified violation of equal access to education for young people in Romania.

Finally, the Court found that prohibiting access to information about an opinion and expression in this regard also appeared as a violation of the freedom of expression in a democratic society, as enshrined in Article 30 of the Constitution, as it could not fall within any of the limits set by the constitutional text. The Court found that a specific form of the freedom of expression at the level of the higher education institutions was, according to the law, academic freedom, implying the free expression of academic opinions, without ideological, political or religious restrictions. At the same time, academic freedom means objectivity in appropriate scientific knowledge and training, universities having the freedom to impose certain scientific and ethical standards. At the level of the higher education institutions, it is forbidden to endanger in any form the right to freely express scientific opinions and the freedom of research is ensured as regards the setting of topics, the choice of methods and procedures and the capitalization on results, according to the law. However, prohibiting the freedom of expression as regards the gender theory obviously determines the prohibition of any research initiative in this field, the impugned rule imposing, independently of any free debate or research, a dogmatic, truncated education, restrictive of the freedom of expression of the teaching staff and beneficiaries of the educational process, ignoring their right to opinion.

III. Consequently, by a majority vote, the Court:

Upheld the objection of unconstitutionality and found that the provisions of Article 7 (1) (e), introduced by the Sole Article of the Law amending Article 7 of Law No 1/2011 on national education, were unconstitutional.

IV. Judges M. Enache and Varga A. have formulated a dissenting opinion.